

**IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF
ALABAMA, SOUTHERN DIVISION**

KELLEY FOODS OF ALABAMA, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	CIVIL ACTION NO. 1:04 - cv-01246-
MYERS NISSI & COMPANY, INC.; a)	MHT-DRB
corporation d/b/a VERTICALSOFT,)	
)	
Defendant.)	

UNOPPOSED MOTION TO CONTINUE

COMES NOW Plaintiff Kelley Foods of Alabama, Inc. ("Kelley Foods") and submits this motion to continue. As grounds therefore, Kelley Foods would show unto the Court as follows:

1. Trial is presently set in this case for September 11th, 2006 in Dothan, Alabama.
2. Attorney Mark Vaughan, who is Kelley Foods' long-time counsel, has represented Kelley Foods since the outset of this case, and is an integral part of Kelley Foods' trial team, suffered a heart attack yesterday, September 4, 2006. The undersigned understand that Mr. Vaughan is presently hospitalized for a cardiac procedure. He is not expected to recover in time to assist Kelley Foods at trial.
3. Kelley Foods would be prejudiced were it required to try this case without Mr. Vaughan, and is in need of additional time in order to allow him to recover or to bring other counsel up to speed to take his place at trial.
4. A continuance may have the additional benefit of allowing the parties additional time to continue their on-going settlement negotiations, and to pursue mediation, to which this Court recently referred this matter.

5. Kelley Foods accordingly requests that the trial of this matter be reset for an available trial docket after January 1, 2007, and that the associated deadlines be reset accordingly.

6. The undersigned have consulted with counsel for Defendant Myers Nissi, and have been advised that Myers Nissi has no objection to the relief requested herein. However, Myers Nissi's counsel has advised the undersigned that they have previously scheduled trial conflicts for the week of January 8th, 2007.

7. Kelley Foods hereby consents to trial in Montgomery, Alabama, if such would permit the Court to schedule an earlier or more convenient trial date to resolve this matter.¹ Myers Nissi's counsel has authorized the undersigned to inform the Court that Myers Nissi likewise consents to trial in Montgomery.

8. If the continuance requested herein is granted, Kelley Foods further requests a stay or extension of the briefing schedule set by the Court on the motions in limine recently filed by Myers Nissi, as well as a continuance of the pending deadlines for jury instructions, trial briefs, and voir dire questions, set for tomorrow, September 6th. Myers Nissi's counsel has likewise authorized the undersigned to inform the Court that they join in this request.

Wherefore, premises considered, Kelley Foods respectfully requests that the Court enter an Order continuing the trial of this case, along with the associated deadlines, to an available trial docket after January 1st, 2007, staying or extending the briefing schedule set by the Court on the motions in limine recently filed by Myers Nissi, and continuing the pending deadlines for jury instructions, trial briefs, and voir dire questions.

¹ Counsel for the parties understand that the Court's first 2007 trial docket in Montgomery is set for February 26, 2007, while the next trial docket in Dothan after January the 8th (for which Myers Nissi's counsel has a conflict) is in June.

Respectfully submitted,

/s/ Howard P. Walthall
Howard P. Walthall, Jr. (WALT1113)
E-Mail: hpwaltha@burr.com

Attorney for Plaintiff
Kelley Foods of Alabama, Inc.

OF COUNSEL:

BURR & FORMAN LLP
3100 Wachovia Tower
420 North 20th Street
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2006, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all properly registered parties and to the extent they are not properly registered with the Court's ECF system, they have been served by directing same to their office addresses via first-class, United States mail, postage prepaid:

John Michael Herke
Paul Darren Palermo
Spyridon Koch Palermo & Dornan
Three Lakeway Center, Suite 3010
3838 North Causeway Boulevard
Metairie, LA 70002

Howard P. Walcott Jr /mcw
OF COUNSEL